

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1342

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

—v—

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN,
PETER S. DAVIS, ALAN E. SANDBERG, and ERIC
BERGE,

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of New York

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC ON BEHALF OF APPELLEES FRIEDMAN AND BERGE

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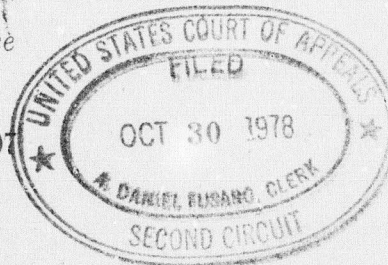
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PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING IN BANC, AND ALTERNATIVE MOTION
FOR A STAY OF MANDATE

Appellee Frederick M. Friedman* respectfully petitions this Court for a rehearing of this appeal and for a rehearing in banc, pursuant to Rules 35 and 40 of the Federal Rules of Criminal Procedure.

This appeal was argued on November 16, 1977 before a panel of this Court consisting of Hon. William H. Timbers, Hon. Walter R. Mansfield, and Hon. Wilfred Feinberg, C.J.J. By decision dated September 14, 1978 this Court reversed the District Court's Order dismissing various portions of the indictment and remanded with instructions to reinstate the unexpurgated indictment.

It is respectfully submitted that a rehearing and/or rehearing in banc of this appeal is necessary because

1. This Court's decision overlooked material facts upon which the District Court relied in dismissing portions of the indictment;
2. This Court's decision overlooked applicable legal principles; and
3. This Court's decision sanctions fraudulent and deceitful conduct by Government agencies upon parties dealing in good faith with the Government.

I.

THE COURT'S DECISION OVERLOOKED MATERIAL FACTS
UPON WHICH THE DISTRICT COURT RELIED, AND IGNORED
APPLICABLE LEGAL PRINCIPLES RELEVANT TO THOSE FACTS

The District Court rendered a comprehensive 82-page decision.

* Appellee Berge joins in the within petition.

Because of the limitations on the permissible size of the within petition, the District Court's findings of fact cannot be reproduced here. The Court is therefore respectfully referred to those findings (at A*41-60) as the factual basis upon which this petition is based.

A. This Court's Opinion Ignored The Facts
Establishing That The SEC Breached An
Agreement It Had Made With Appellee.

The District Court dismissed portions of the indictment because representatives of the SEC, in settlement negotiations arising out of an investigation concerning the matters that gave rise to this indictment, "behaved improperly" and engaged in a "deplorable" course of conduct of "misleading counsel" and because "the SEC representatives in question engaged upon a deliberate course of concealment, first of their intention to make a criminal reference, and then of the fact that the reference had been made, in order to obtain civil consent judgments imposing substantial sanctions upon the defendants"; the District Court further observed, "It is a sad irony that representatives of a governmental agency dedicated to the prevention of fraudulent and misleading statements fell into this particular pattern of behavior." (A70, A72). Judge Mansfield's concurring opinion recognized that the conduct of these SEC representatives was "deceitful and duplicitous" and violated an "ethical obligation" owed to appellees. This Court's opinion, while not questioning any of the District Court's findings of fact, refers only

* The letter "A" followed by a number designates page reference to the Joint Appendix.

to "alleged misconduct" by SEC "employees"*.

In this Court, appellee argued that not only were the District Court's reasons for dismissal proper, but in addition the SEC's criminal reference violated an agreement between the SEC and appellee that the SEC would not make a criminal reference. Appellee argued in this Court that the underlying facts found by the District Court established such an agreement.** "Unlike findings of basic fact, which must be shown to be clearly erroneous to be set aside, an appellate tribunal will independently reconsider the legal import of basic facts found by the district court." S.E.C. v. Bausch & Lomb Inc., 565 F.2d 8, 15 (2d Cir. 1977).

Accordingly, appellee Friedman argued in this Court (at pp. 4-23 of his brief) that such an agreement existed as a matter of law in view of the District Court's underlying and undisputed factual findings, and in view of the well-established legal principle that "In the absence of any explanation for their remaining silent proof that they did so remain, knowing, or chargeable with knowledge, that the appellant was continuing to perform under the impression that

* Slip Op. 4719, 4732, 4740. The two primary culprits of the SEC, Messrs. Tucker and Perlmutter, were not simply low-level functionaries or "employees" in the SEC's New York Regional Office ("NYRO"). "Tucker, although reporting to his superiors at the New York regional office, was in operational command of the inquiry. Perlmutter was his top assistant." (See District Court's finding of fact #20). During the course of the SEC's investigation Tucker became acting assistant regional administrator, and Perlmutter a branch chief. (A545-A547).

** "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1078 (n. 25) (2d Cir. 1977), cert. denied 98 S.Ct. 769 (1978).

the [proposal] was satisfactory to them would create an estoppel which would have the same effect as their express assent to the terms stated [by appellant]." Willard Helburn, Inc. v. Spiewak, 180 F.2d 480, 482-483 (2d Cir. 1950); Hellenic Lines Ltd. v. Gulf Oil Corp., 340 F.2d 398, 401 (2d Cir. 1965); Ballard v. Tingue Mills, 128 F.Supp. 683, 688 (D.Conn. per Hincks, C.J. 1954) ("Silence and inaction in certain circumstances can operate as an acceptance of an offer, as, for instance, where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation. See Vol. 1, Restatement of the Law of Contracts, 372(b)."); Thomson v. United States, 357 F.2d 683, 689, 690 (Court of Claims 1966); Brooks Towers Corp. v. Hunkin-Conkey Construction Co., 454 F.2d 1203, 1207 (10th Cir. 1972).

The District Court, while recognizing this principle, held that it did not apply to this case--but that "the question [of whether there was such an agreement] is not free from difficulty" (A65). This Court overlooked this principle, which other panels of this Court have adopted.

In support of the proposition that there was an agreement that the SEC would not make a criminal reference, virtually all of the following relevant facts were simply overlooked by this Court notwithstanding the fact that they were expressly brought to this Court's attention in the first point of appellee's main brief:

1. Whatever specific words were used by Gould at the initial meeting with the SEC's attorneys on January 14,

1975, Tucker (and presumably the other SEC attorneys present at the meeting who heard the same words) "was fully aware that defendants' counsel had as one of their two primary objectives [not merely "their desire", as this Court characterizes it (at Slip Op. 4725)] the avoidance of a criminal reference." (F*16)

2. At his next meeting with the SEC, "Gould again made clear to the SEC representatives that one of his primary concerns was to avoid a criminal reference in respect of his individual clients (Fields, Friedman, and Davis)", a statement Gould again repeated during subsequent discussions with the SEC attorneys (F 19, F 24).

3. "On June 17, 1975, in separate telephone conversations, Tucker advised Gould and Kantor that the SEC investigation was almost concluded; and that it appeared that the January 14 disclosures had been substantially complete and accurate." (F 21)

4. The minutes of the meeting of TDA's board of directors for July 18, 1975 state, inter alia:

"Mr. Kantor reported that on June 17, 1975, a member of the SEC staff had informed him that their investigation was 95 per cent complete and that his staff would not refer the matter for criminal prosecution." (A401)

Fields and Friedman were present at this meeting and heard the statement. (A475)

* The letter "F" followed by a number designates reference to the District Court's numbered findings of fact.

5. Fields and Friedman resisted the settlement terms initially demanded by the SEC, but were told by Gould "in response to their resistance that if Fields and Friedman did not authorize him to attempt to settle the case on the terms recommended by Gould, then the SEC would not be bound by the agreement which, in Gould's expressed view, it had made with them not to make a criminal reference." (F 25)

6. On September 16, 1975, the SEC filed its civil complaint. Gould believed this violated an agreement he had reached with Perlmutter that its filing would be deferred until the consent then being negotiated could be finalized and filed with the complaint. Gould angrily upbraided Perlmutter, and Perlmutter became "upset at the incident." (F 26)

7. Shortly after being upbraided by Gould, Perlmutter telephoned Assistant United States Attorney Sorkin "to urge that the United States Attorney's office 'investigate the TDA matter.' Perlmutter stated that 'we really want to get TDA', but advised Sorkin that he first wanted to 'wrap up' the civil settlement before the United States Attorney began its own inquiry. Perlmutter made several other calls to Sorkin, of similar import, during October and November." (F 32)

8. On September 30, after Gould became ill and Judge Streit, his law partner, took over the representation of Fields, Friedman, and Davis, Judge Streit met with Tucker and Perlmutter. At this meeting the SEC attorneys announced that the money they would insist the appellees pay to TDA in

order to settle the case was now \$585,000.00. "Judge Streit responded that it was a 'horrendous' amount, and there were serious questions concerning some of the figures, 'but in light of the fact that there is to be no criminal prosecution I shall endeavor to obtain the money for you' (Tr. 150-153)." (F 27)

9. "Tucker and Perlmutter remained silent in the face of [Judge] Streit's comment." (F 27)

10. "[Judge] Streit reported this meeting to Fields, Friedman and Davis, including the above-quoted statement that had been made by Judge Streit to which the SEC representatives had not responded." (F 28)

11. At subsequent meetings over the next several months among Fields, Friedman, Davis, and their attorneys, "Fields, Friedman and Davis resisted the terms that the SEC was demanding for settlement of the civil case. However, their resistance was overcome by their attorneys' advice to them that the SEC had agreed that if a satisfactory settlement was made of the civil action, there would be no criminal reference." (F 28)

12. After Gordon, attorney for Mosler, was told separately by Fields and by Kantor that as part of the settlement the SEC had agreed not to make a criminal reference, Gordon scheduled a meeting with Perlmutter for the specific purpose of confirming it. At that meeting "Gordon advised Perlmutter that he represented Mosler, and stated to Perlmutter, among other things, that in deciding whether to accept a directorship in

TDA it was important for Mosler to know whether there was going to be a criminal reference of the case. Gordon further stated to Perlmutter that Gordon understood there was not going to be a criminal reference. Perlmutter assured Gordon that there was not going to be a criminal reference. Gordon thereafter reported Perlmutter's assurance to Mosler and to Fields." (F 29)

13. Tucker and Perlmutter falsely testified at the hearing that the conversation to which Gordon testified did not occur (A575, SA*21). The Court expressly rejected their denials (F 29, A68). Tucker and Perlmutter also testified falsely at the hearing when they swore that Gould had been specifically told that there was "no deal on criminal". (F 24)**

14. On October 20, when Ostrow, counsel for Sandberg, concluded he could not persuade Tucker and Perlmutter to pursue lightly, if at all, the complaint against Sandberg, "Ostrow agreed to recommend that Sandberg enter into a settlement, stating that settling would be 'better than going over to the golden dome', a reference to the United States Courthouse across the street from and visible from the window of the SEC's office. Ostrow's reference to 'going over to the golden dome' was intended by Ostrow to be a reference to facing a federal indict-

* The letters "SA" followed by a number designate page reference to appellees' supplemental appendix.

** Such explicit findings that Tucker and Perlmutter committed perjury does not support this Court's observation that the District Judge "acknowledg[ed] that his findings hinged on close questions of credibility." (Slip Op. 4723)

ment. Under the circumstances, it was undoubtedly so understood by Tucker and Perlmutter, who chuckled at the statement but said nothing." (F 31)

15. On December 1, Gould and Judge Streit met with Tucker and Perlmutter to discuss the appellees' collateralization of their substantial financial obligations under the settlement then in its final stages, and Gould told them they had "got a great settlement, take it". That same afternoon, after Gould had left, Tucker referred the case to the United States Attorney's Office by means of a telephone conversation with Assistant United States Attorney Wing and a follow-up letter to Wing. (F 33; A205)

16. "At the time he made the criminal reference of the TDA case, Tucker knew that avoidance of a criminal reference was one of two primary objectives for Fields and Friedman in the civil settlement negotiations (the other being their retention as corporate officers), and the only objective for Davis, an attorney who was not an officer . . . Notwithstanding that knowledge, Tucker at no time disclosed to counsel for these defendants that a criminal reference had in fact been made. That non-disclosure was calculated and deliberate, not inadvertent. Tucker testified that he did not want to do anything that would jeopardize the civil settlement (Tr. 1028-1029), and that, in his view, the defendants

" . . . believed that there would be no criminal case growing out of this and that is why they entered into a consent decree." (Tr. 1091)." (F 25)
(See also A634-A636)

17. "[H]ad [Gould] known, subsequent to December 1 but before execution of the consents to judgment, that a criminal reference had in fact been made, he would have recommended to his clients that they not enter into the consents . . . Such advice would have been accepted, so that the SEC would have lost the civil settlement which Tucker's concealment of the criminal reference was specifically designed to protect." (F 37). Counsel for the other appellees would have similarly advised their clients, who would also have followed their advice. (F 28 and F 39).

18. Although the District Court's opinion makes no reference to it, the following was also established. On May 5, 1976, Kantor first learned that the United States Attorney's Office was investigating the matters that had been set forth in the SEC's complaint. Kantor called Tucker and asked Tucker whether the SEC had made a criminal reference in violation of the SEC's agreement not to do so. Tucker replied that the SEC had not made a criminal reference. (A406-A408, A575-A576) Up to and including this call from Kantor to Tucker, no SEC representative ever told or indicated to any attorney for any appellee that Gould's proposal and stated objective on January 14, 1975, repeated thereafter, that the case be settled on a civil basis and that the SEC not make a criminal reference, was not accepted by the SEC. Gould, Judge Streit, Kantor, Fields, Friedman, Davis, Sandberg and Berge all acted throughout this period on the understanding that the SEC had agreed on January 14, 1975,

subject to certain contingencies that were all satisfied, that the SEC would not make a criminal reference; and Messrs. Tucker and Perlmutter were aware, during all stages of their involvement and participation in this case, that Gould, Judge Streit, Kantor, and the appellees were proceeding on the basis of that understanding.*

It is additionally significant to point out that had this Court not overlooked appellee's argument that an agreement that a criminal reference would not be made existed as a matter of law in view of the underlying findings of fact by the District Court, it would not have attempted to distinguish the instant case from United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975) on the ground that in Rodman the SEC "broke its promise."

* This Court's opinion states:

"Defendants' experienced counsel of course also were aware of the SEC's long standing and well known policy against settling civil actions in a manner that would impair subsequent criminal prosecutions." (Slip Op. 4724; emphasis in original)

This assertion overlooks (1) Gould's express testimony to the contrary (A305-A310, A361-A362), and (2) testimony given at the hearing by William Nortman, who at the time of the SEC's TDA investigation was Assistant Regional Administrator of the NYRO and at the time of the hearing was Associate Regional Administrator of the SEC's Atlanta Regional Office, that he understood that such negotiations at the staff level were appropriate and proper. (A743-A747)

B. This Court Overlooked The Facts Which
Formed The Basis For The District Court's
Exercise Of Its Supervisory Powers In
Dismissing Portions Of The Indictment

The District Court, in dismissing portions of the indictment under its supervisory powers, considered two essential elements: the scope of the fraudulent conduct by the Government's representatives, and the extent of the prejudice to the appellees. This Court overlooked virtually each factual finding relating to both of these elements.

As previously noted, this Court overlooked the most telling of the District Court's factual findings which dealt with the shocking fraud committed by the Government's attorneys upon all appellees. In addition, this Court completely overlooked the second element considered by the District Court, i.e., the extent of the prejudice to appellees. That prejudice affected their "civil" case and their "criminal" case, and was and is irremediable except through the sanction of partial dismissal as ordered by the District Court.

The District Court's opinion succinctly stated (at All7-All8, n. 2) the nature of the relief sought by the SEC in its complaint, and the relief obtained by the SEC in the consent judgments:

"The various consents provided for the following relief which the SEC had demanded in its complaint:

(a) The SEC's complaint sought broad injunctive relief against the seven defendants in the civil action; all of the defendants consented to the injunctive relief which the SEC had demanded;

(b) In connection with the ERD transactions, the SEC's

complaint sought payment of \$435,000.00 by Fields, Friedman, and Davis to TDA, which was the total amount of the alleged profits derived by all parties (not merely Fields, Friedman, and Davis) to these transactions. In their consents, Fields, Friedman, and Davis agreed to pay that entire amount to TDA, and fully collateralized that amount, although the SEC's own investigation revealed that the total amount received by these defendants from the ERD transactions was only \$72,250.00, and the defendants were still subject to civil lawsuits from the original sellers of the securities involved in the ERD transactions;

(c) In connection with the Eagle Roofing finder's fee, the SEC's complaint sought payment of \$100,000.00 by Fields and Friedman to TDA, which was the total amount of the allegedly unlawful finder's fee. In their consents, Fields and Friedman agreed to pay that entire amount, which they fully collateralized, although the SEC's own investigation revealed that \$18,000.00 of that amount had never been received by any of the defendants;

(d) In connection with the Trophies, Inc. finder's fee, the SEC's complaint sought payment of \$50,000.00 by Fields and Friedman to Westcalind, which was the total amount of the allegedly unlawful finder's fee. In their consents, Fields and Friedman agreed to pay that entire amount, which they fully collateralized, although the SEC's own investigation revealed that \$15,000.00 of that amount had never been received by any

of the defendants;

(e) The SEC's complaint sought an order prohibiting Fields, Friedman and Berge from acting as either officer or director of TDA or Westcalind; the consent judgments prohibited Fields, Friedman and Berge for a two-year period from serving as directors of TDA or Westcalind, and, further, from serving as chief executive officer of either company for a two-year period. However, Fields was permitted to remain president, in which capacity he would be chief operating officer, and Friedman was permitted to retain his positions as well;

(f) The SEC complaint sought an order prohibiting Fields and Friedman from voting their shares of TDA and Westcalind stock for a 'just and proper' period of time; Fields and Friedman consented to such a prohibition for a two-year period;

(g) The SEC complaint sought an order appointing a receiver for TDA and Westcalind; the consents implemented this request to the SEC's satisfaction by providing for the appointment of independent directors for TDA and Westcalind, as well as Fields' and Friedman's resignations from both board of directors and the appointment of new chief executive officers for both corporations;

(h) Defendant Davis consented to the most severe administrative sanction available to the SEC, a lifetime resignation from practice before the SEC, as a result of which Davis was forced to resign from the law firm he had built up, which specialized in SEC practice, and was forced to give up the practice of law;

(i) Defendant Sandberg consented in all respects to all relief which the SEC complaint had sought against him, as did defendant Berge."

In light of these settlement terms, the District Court accurately concluded that "it is impossible, by reopening the civil consent judgments, to restore the individuals concerned to the positions in which they found themselves at the time of the nondisclosure of the criminal reference, in December of 1975, and the subsequent execution of the consent judgments." (A74) Appellees were prevented for the full period dictated by the settlement from acting as directors of TDA and Westcalind, from serving as chief executive officers of TDA and Westcalind, from voting their shares of TDA and Westcalind stock, and from the use of the substantial assets which they paid in settlement. Even the Government in its appellate brief in this Court abandoned the contention it had made in the District Court that the appellees could be "made whole" by any remedy short of dismissal of the relevant portions of the indictment.

This Court not only overlooked every aspect of this substantial prejudice to the appellees in the "civil" sense but also ignored the prejudice to them in the "criminal" sense.

The prejudice "in the criminal case" to the appellees in this case and in Rodman was this: had the Government lived up to its agreements in each of these cases, there would have been no criminal case. This case reached the United States Attorney's Office, and hence the grand jury, as a direct result of the SEC's breach of the understanding between the appellees and the SEC that the SEC

would not make a criminal reference of the matter. The Government conceded that the matter came to the attention of the United States Attorney's Office only through the criminal reference here involved (A8-A9). In short, the clearest and most immediate prejudice suffered by the appellees "in the criminal case" as a result of the SEC's violation of its agreement with them is that the appellees were indicted as a direct fruit of the Government's breach of the agreement.

Furthermore, had the SEC attorneys not fraudulently induced the appellees to enter into this onerous settlement, they would then have had the opportunity to attempt to persuade the United States Attorney's Office not to indict them by offering at that point to settle the civil case on these terms.

Beyond this "criminal" and "civil" prejudice, "judicial integrity and the interests of justice" required the District Court to specifically enforce a commitment by the Government, even where there is "no prejudice, apart from that suffered by the administration of justice". Matter of Doe, 410 F.Supp. 1163, 1165, 1166 (E.D.Mich, 1976).

In view of the above, this Court's attempt to distinguish this case from Rodman overlooks the most essential factual elements in this case. This Court's attempted distinction of Rodman (at Slip Op. 4734) is based on three factors: that in Rodman (a) the SEC "broke its promise", (b) the SEC "obtained incriminating evidence from the defendant in reliance on that promise", and (c) the promise was "to 'strongly recommend' against prosecution" (Slip Op. at 4734). The instant case presented an indistinguishable situation: (a) the

SEC broke its promise to the appellees and/or committed what we respectfully submit was the far more serious offense of fraud against the appellees*, (b) in Rodman, the prosecutor agreed, during the course of the pre-trial hearing on Rodman's motion to dismiss the indictment, not to use any of Rodman's statements, and the District Court in Rodman, in addition to its order dismissing the indictment, also alternatively suppressed Rodman's statements "in case some other court disagrees with me on the matter of the motion to dismiss" (A165) (thus both in Rodman and the instant case the defendants would not have been prejudiced in a mere evidentiary sense), and (c) not only did the SEC agree, or deliberately lead the defendants to believe the SEC had agreed, to "recommend against" criminal prosecution, but to make no criminal reference whatsoever of this case--and it is undisputed that had the improper criminal reference not been made, there would have been no indictment in this case.

Finally, this Court states that the sanction imposed by the District Court was unjustified because "we know of no other instance where this [improper conduct by the SEC] has occurred." (Slip. Op. at 4734) This statement overlooks the fact that in Rodman the mis-

* Cf. United States v. Russell, 411 U.S. 423, 431-432 (1973) ("[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . ."). This statement of the Supreme Court is overlooked by this Court's holding that only two objectives--neither of which was present here--would ever justify dismissal of an indictment. (Slip Op. 4733-4734).

conduct at issue was committed by the same agency involved in this case--the SEC--and not by the United States Attorney's Office. Moreover, the perpetration of a fraud on appellee and the commission of perjury to conceal that fraud, as occurred here, is certainly more heinous than the broken promise in Rodman.

Furthermore, it is respectfully submitted that a Government agency such as the SEC should no more be granted one or two instances of fraudulent misconduct and perjury than should a defendant who is charged with the commission of his first crime.

Finally, the SEC itself, in an institutional sense, misled the District Court and this Court, as follows. In a petition for rehearing in the District Court, the SEC (through an affidavit of its Assistant Director in the Division of Enforcement in Washington, D. C.) advised the District Court that "on the basis of the factual findings contained in the opinion of the Court, the Commission has undertaken an independent inquiry in this matter at the conclusion of which the Commission will take all actions which it deems appropriate." (A128). This representation was endorsed by the Government in the District Court and in this Court, with the Government arguing that the SEC was adequately pursuing the matter internally and thus there was no need for the District Court to exercise its supervisory powers. However, the Government failed to advise either the District Court or this Court, as the appellees later learned and advised this Court, that the SEC had subsequently decided to "defer" its inquiry until the instant case is concluded (A51-SA4). Thus, the SEC by its claim of action, followed by inaction, has already

demonstrated that only the exercise of judicial supervisory powers will prevent a repetition of this type of fraudulent conduct. It is most respectfully submitted that this Court's decision will not only result in the SEC taking no corrective action, but will give carte blanche to all Government agencies to act as they wish, without any fear that fraudulent conduct by their representatives, supported later by perjury, will be judicially dealt with in the strong terms such conduct merits and which the District Court properly invoked.

II.

THE COURT'S DECISION ON THE ALTERNATIVE GROUNDS
FOR DISMISSAL OF COUNTS 1-4 OVERLOOKS DECISIONS
OF THE SUPREME COURT OF THE UNITED STATES AND
THE PURPOSES FOR WHICH CONGRESS ENACTED § 16(b)

This panel reversed the District Court's decision which dismissed Counts 1-4 on alternative grounds. On Counts 1-3, the District Court was found to be in error in concluding as a matter of law that there was no Section 17(a) violation because the alleged non-disclosure of the sale of stock by a group of stockholders (ERD) in April or May, 1971, in which 70% of the gross profit was to be obtained by appellees, did not constitute a material non-disclosure in a prospectus issued by TDA on November 10, 1971. Besides holding that the non-disclosure had no impact on the financials of the company which could materially affect a decision of a potential purchaser of TDA stock in 1971, the District Court also concluded that (a) the victim of the alleged fraud was ERD, not TDA, and that ERD

was the seller and not a buyer protected by Section 17(a), (b) that the charge was an attempt to evade the five-year statute of limitations on the crime charged, and (c) the transactions which occurred in April and May, 1971 had no causal connection with the offer and sale of TDA securities in November, 1971.

This Court addressed only the question of materiality, holding that under TSC Industries v. Northway, Inc., 426 U.S. 438 (1976), "a sufficient basis of materiality" has been shown by the Government to raise an issue of fact. Such a showing was found to exist in the Government's claim that "the ERD kickbacks . . . may well be immediately recoverable by TDA, Inc. as a short-swing purchase and sale under 16(b) of the 1934 Act," even though this Court noted the "Defendants' \$300,000 profit on this transaction . . . ultimately [came] out of the pockets of the defrauded stockholders". (Slip Op. 4738). This decision, it is respectfully submitted, should be reconsidered by this panel or, in the alternative, by the Court in banc since the opinion, if permitted to stand, would result in opening the door to a floodgate of litigation which the Supreme Court of the United States and other Judges of this Court have eliminated from the federal courts, in cases such as Santa Fe Industries, Inc. v. Green, 462 U.S. 430 (1977); Piper v. Criscraft Industries, Inc., 430 U.S. 1 (1977); Cort v. Ash, 422 U.S. 66 (1975); Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977); and Joyce v. Joyce Beverages, Inc., 571 F.2d 703 (2d Cir. 1978).

The ERD transactions, we submit, no matter how cleverly characterized by the Government to sustain a criminal charge of

non-disclosure under § 17(a) of the 1933 Act, presents a classic example of internal corporate mismanagement for which the state courts have provided a sufficient and adequate remedy. Cf. Haberman v. Murchison, 468 F.2d 1305, 1313-1314 (2d Cir. 1972); Rapoport v. Schneider, 29 N.Y.2d 396, 400, 328 N.Y.S.2d 431, 435 (1972). The opinion wrongly interprets TSC Industries v. Northway, supra, we submit, to permit federal jurisdiction as to such claims which have been hitherto relegated to the states.

The Supreme Court in TSC Industries v. Northway could not have intended that a party could convert a purely state claim of corporate mismanagement into a federal cause of action either under Section 17(a) of the 1933 Act or Section 10(b) of the 1934 Act through the ruse of a conclusory allegation such as this Court's opinion would now permit. In Supt. of Insurance v. Bankers Life and Casualty Co., 404 U.S. 6, 12 (1971), the Supreme Court cautioned that it was not seeking to enlarge federal jurisdiction in SEC anti-fraud claims to transactions which represented internal corporate mismanagement. Thus, it aptly stated, "Congress by Section 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." There is nothing, we respectfully submit, in TSC Industries v. Northway to indicate that the Supreme Court's caveat in Supt. of Insurance v. Bankers Life, supra, was to be disregarded. On the contrary, its intention would seem to be otherwise in view of the fact that its opinion in TSC Industries v. Northway antedates its opinions in Santa Fe v. Green, supra,

Piper v. Criscraft, supra, and Cort v. Ash, supra, in which the Supreme Court held that the states have exclusive jurisdiction over such matters.

Reconsideration of this panel's decision is further warranted in view of the division of other panels of this Court as to the meaning and application of TSC Industries v. Northway with regard to the sufficiency of a cause of action under federal law of purely state claims of corporate misconduct by alleged deception and non-disclosure by officers and directors of a corporation. Thus, a divided panel of this Court split on this issue in Goldberg v. Meridor, supra. The majority reversed the dismissal of the complaint, interpreting TSC Industries v. Northway as requiring a finding that an issue of fact existed for a 10(b)(5) claim without regard to the existence of an adequate state remedy. The dissenting opinion by Judge Meskill rejected the broad approach of the majority and concluded, "Yet under the majority's reasoning the failure to inform stockholders of a proposed defalcation gives rise to a cause of action under 10(b)(5). Thus, the majority has neatly undone the holdings of Green, Piper and Cort by creating a federal cause of action for a breach of fiduciary duty that will apply in all cases, save for those rare instances where the fiduciary denounces himself in advance. If the defendants have looted UGO in the manner alleged by the plaintiffs, a full recovery should not be difficult to obtain. Under New York state law, this would be a breach of the fiduciary duty imposed upon directors." A similar division on similar grounds, we submit, occurred in Joyce v. Joyce Beverages, Inc., supra, as evidenced by the dissenting opinion of Judge Oakes.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1342

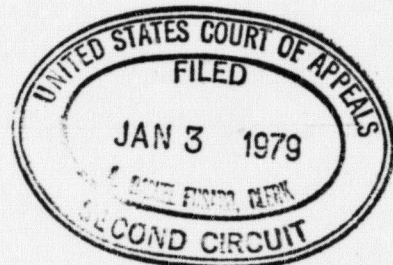
UNITED STATES,

Plaintiff,

v.

DOUGLAS P. FIELDS, et al.,

Defendants.



Appeal from the United States District Court
for the Southern District of New York

MEMORANDUM OF THE SECURITIES AND EXCHANGE
COMMISSION, AMICUS CURIAE, IN RESPECT TO
THE PENDING PETITIONS FOR REHEARING

This memorandum is respectfully submitted on behalf of the Securities and Exchange Commission ("Commission"), which previously filed an amicus curiae memorandum in this case on December 19, 1977, at the request of the Court. This memorandum is submitted in respect to the pending petitions for rehearing and rehearing en banc, and in particular with respect to claims in those petitions concerning certain apparent inaccuracies in the Court's September 14, 1978, opinion regarding the Commission's procedures. See Petition of Appellees Friedman and Berge, pages 1-19; Petition of Appellee Fields, pages 3-10; see also, letter of October 10, 1977, from Robert B. Fiske, Jr., United States Attorney.

For the reasons stated herein, the Commission believes that it would be appropriate for the Court to correct certain technical inaccuracies in its

opinion, none of which, it is submitted, should affect in any manner the result reached by the Court. A short discussion of the relevant background may be helpful to the Court's consideration of the specific modifications which the Commission would propose.

BACKGROUND

As the Court noted at page 4724 of its slip opinion, shortly after members of the Commission's staff learned of the matters which formed the basis of the Commission's injunctive suit and the subsequent indictments, the Commission entered, on February 19, 1975, a formal order of investigation. An investigation was conducted, and a number of discussions regarding a possible settlement of the Commission's civil action were held with the defendants; the Commission's suit was filed on September 16, 1975. ^{1/} The individual defendants signed consents to the entry of permanent injunctions, and final judgments were entered against them by the district court.

As this Court further noted, at about the same time the Commission's injunctive suit was filed, Commission employees "were in touch with the United States Attorney's Office * * * on the subject of a prospective criminal reference of the TDA matter." Slip op. 4725 (emphasis added). This communication was, as the Court recognizes, a preliminary contact, not a formal or informal criminal reference. On December 1, 1976, the same day a settlement discussion with respect to the injunctive proceeding was held with the defendants, one of the members of the Commission's staff telephoned the Assistant United States Attorney about the case, and, on the same date, sent a letter

^{1/} Securities and Exchange Commission v. TDA Industries, Inc., et al., 75 Civ. 4519-LWP.

to the Assistant United States Attorney enclosing the pleadings which had been filed in the injunctive action. The Court characterizes this as an "informal criminal reference" (slip op. 4726); as the Commission used the term in its amicus curiae brief, however, an "informal criminal reference" is a Commission-authorized referral of files, including non-public investigatory material, to the United States Attorney at the request of the latter. Commission Br. at 11. As we pointed out, such an "informal criminal reference" is generally done by the Commission without recommending that any action be brought or that particular persons be named as defendants. Id. The communication which occurred on December 1, 1976, was not such an "informal criminal reference," however, because it involved only further preliminary communications and the forwarding of publicly available materials. These types of communications do not require express Commission authorization, and no Commission authorization was sought or obtained.

As noted in the Court's opinion, after the December 1, 1976, communication between the Commission's staff and the United States Attorney's Office, "There followed an investigation of the TDA matter by the United States Attorney's Office, presentation of the case to a grand jury, and the return of the instant indictment on November 8, 1976." Slip op. 4727.

DISCUSSION

After setting forth an accurate factual description of the case (slip op. 4718-4727), the Court's preliminary discussion of the Commission's procedures (slip op. 4727-4732), which precedes its discussion of the "chief issue in the case" (slip op. 4732-4740), contains what appear to be two

different types of characterizations that are not technically accurate:

(1) The Commission's formal investigation is at several points described as an informal investigation. In fact, the informal investigation of the TDA matter covered the period from January 14, 1975, when the staff first learned of the matter, to February 16, 1975, when a formal order of investigation was entered by the Commission. After the entry of such an order, the Commission designates an investigation as "formal."

(2) As noted supra, the Court at several points refers to the communications between the Commission's staff and the United States Attorney's Office on December 1, 1975, as an "informal criminal reference." As the Commission uses the terms, however, both a formal and an informal criminal reference require Commission authorization. See Commission Br. 11-12. Rather, the December 1, 1975, contact was in the nature of "preliminary communications between the Commission's staff and the offices of the United States Attorney," which the Commission fully described at pages 8-10 of its amicus brief.

As set forth in detail in the Commission's brief, it has long been the Commission's policy to encourage its staff to bring to the attention of the United States Attorneys, at the earliest possible stage of an investigation (whether formal or informal), activities in which the staff believes a United States Attorney may have an interest. This is done in order to facilitate an early determination by the United States Attorney with respect to whether he may have an interest in pursuing a particular matter, and thereby to expedite the process by which a case may be brought before the grand jury. As we pointed out at pages 8-9 of our brief, and as the Court noted at page 4731 of its opinion, these procedures help the United States Attorney avoid

statute of limitations problems, while at the same time protecting the interests of a particular defendant in a speedy criminal trial. In view of these important interests served by the Commission's policy, this Court cited the Commission's procedures respecting this type of communications as a "commendable example of intra-agency cooperation," and both this Court and the district court declined to interfere with those procedures and working relationships. See United States v. Fields, [1977] CCH Fed. Sec. L. Rep. ¶96,074 at p. 91,848 (S.D. N.Y. 1977). 2/

These preliminary communications, which do not rise to the level of a formal or even an informal criminal reference, may, as we pointed out, assume a variety of forms, including regular discussions or inquiries made from time to time regarding pending matters, or the forwarding of relevant publicly-available documents, including court pleadings or documents filed with the Commission. In addition, as a separate matter, the Commission's staff is authorized to disclose non-public information to other law enforcement authorities whenever its investigation is an informal one, as the Court noted at page 4730 of its opinion.

In view of the above facts, the Commission respectfully suggests that the Court's opinion be modified at several points. First, the following modifications to the Court's various references to the December 1, 1975, communication between the Commission's staff and the United States Attorney's Office would appear appropriate.

2/ The district court also referred to these informal communications as an "informal criminal reference," apparently giving a different meaning to the term than the meaning which the term has at the Commission. CCH Fed. Sec. L. Rep. at p. 91,848.

(1) At page 4726, lines 10-13, it is stated that "Tucker had made an informal criminal reference of the TDA matter to the United States Attorney's Office on December 1, as stated below." To avoid the implication that this "reference" was the "informal criminal reference" described in the Commission's amicus brief, which, as explained above, it was not, it is suggested that the phrase be modified to read: "Tucker had communicated with the United States Attorney's Office concerning the TDA matter on December 1, as stated below."

(2) At page 4726, lines 26-27, the phrase "made an informal criminal reference of the TDA matter to Assistant United States Attorney Wing" appears. For the same reasons stated above, it is suggested that the phrase be modified to read: "communicated with Assistant United States Attorney Wing regarding the TDA matter."

(3) At page 4727, lines 7-9, the phrase "the informal criminal reference of this case by the SEC to the United States Attorney's Office" appears. For the same reasons stated above, it is suggested that this phrase be modified to read "the communications regarding this case by the Commission's staff to the United States Attorney's office."

In addition, the following modifications to the Court's references to the nature of the Commission's investigation of TDA would appear warranted:

(1) It is suggested that the final sentence which appears at pages 4727-28, beginning "It is important * * *" might be amended to read:

"It is important to bear in mind the distinctions, under SEC procedure, between preliminary communications between the Commission's staff and the United States Attorney's office, which may occur in the context of either a formal or informal investigation, and Commission criminal referrals, which may in turn be either formal or informal."

(2) On page 4728, lines 4-5, the words "which was utilized in the instant case" should be deleted, as should the words "(not utilized here)" which appear at line 9 of this same page.

(3) On page 4731, lines 5-6, it is respectfully suggested that the phrase "at an early stage of an investigation, that is, during an informal or preliminary investigation" be modified. As noted, the preliminary communications referred to earlier in this paragraph may take place in the context of either a formal or informal investigation, whenever matters of mutual interest to the Commission and the United States Attorney are involved. See Commission Br. at 8-9. In the instant case, the communications occurred in the context of a formal investigation. The Commission would suggest, therefore, that the phrase quoted above would more appropriately read "at an early stage of either a formal or informal investigation." The next three sentences in this paragraph contain inaccuracies of the type already discussed, and it is respectfully submitted that they may either be amended as deemed appropriate by the Court, or deleted as unnecessary to the sense of the paragraph. As the final sentence of the paragraph points out, the district court declined to invalidate the Commission's procedures with respect to cooperative communications with the United States Attorney, a holding this Court found to be entirely correct. The following paragraph (beginning "As the SEC points out * * *") is a continuation of the discussion of the nature of the preliminary communications between the Commission and the United States Attorney (see Commission Br. 8-9), not, as the sentence might be read to indicate, informal investigations or informal criminal references. It is suggested that this can be clarified by modifying the first sentence of this paragraph to read: "As the SEC points out in its amicus brief, the

procedure permitting preliminary communications with the United States Attorney has significant advantages."

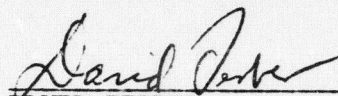
* * * * *

As we noted earlier, we do not believe that the discrepancies in the Court's description of the Commission's procedures should affect the Court's decision. As the Court pointed out at page 4732, the description of the Commission's procedures was merely preliminary to its consideration of "the chief issue in this case—whether the district court in this criminal action abused its discretion in dismissing and striking substantial portions of the indictment because of alleged misconduct by employees of the SEC in attempting to settle the civil action." Slip op. 4732, footnote omitted, emphasis in original. The "misconduct" found by the district court—findings that were not challenged in this appeal—concerned the failure to disclose the contacts the Commission's staff had had with the United States Attorney's Office, in circumstances in which the staff's silence might have been construed as an indication that no criminal action would be filed. Slip op. 4734. As the Court noted, however, this "misconduct" resulted in no harm to the defendants at the time it occurred, since the defendants "with their backs to the wall because of the New York County District Attorney's anticipated reference of the matter to the SEC, had long since disclosed enough facts to the SEC to enable the government to marshal the evidence and to proceed both civilly and criminally against them." Id. The precise nature of the Commission investigation, or the staff's communications with the United States Attorney's Office on December 1, 1975, or any other date, should not alter the Court's conclusion with respect to the chief issue in the case.

CONCLUSION

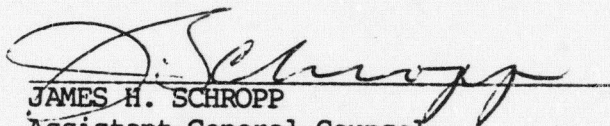
The Commission appreciates this opportunity to apprise this Court concerning the above matters. It is respectfully submitted that the modifications suggested herein will correct internal inconsistencies in the Court's opinion which, while not affecting the result reached herein, might have led to confusion with respect to the Commission's investigatory and criminal reference procedures.

Respectfully submitted,



DAVID FERBER

Solicitor to the Commission



JAMES H. SCHROPP

Assistant General Counsel

Securities and Exchange Commission
Washington, D.C. 20549

December 22, 1978

Indeed, what was said by Chief Judge Kaufman in S.E.C. v. Bausch & Lomb Inc., supra, as to the difficulty of determining what is or what is not material information required to be disclosed is added reason for not interpreting § 17(a) or § 10(b) as this panel has now done and thus criminalizing certain conduct on an ad hoc basis where appellee would not have been aware in advance that such alleged conduct would be declared criminal. "But, since the importance of a particular piece of information depends on the context in which it is given, materiality has become one of the most unpredictable and elusive concepts of the federal securities laws. The SEC itself has despaired of providing written guidelines to advise wary corporate management of the distinctions between material and non-material information, and instead has chosen to rely on an after-the-fact, case-by-case approach, seeking injunctive relief when it believes that the appropriate boundaries have been breached."

The issue of fact which this Court finds warrants a reversal depends, however, upon whether the ERD transactions "may" constitute a violation of Section 16(b). Assuming proof exists of these transactions, this Court concluded that Section 16(b) may be violated, without making any inquiry as to whether the ERD transactions could accomplish the practices Section 16(b) was intended to prevent.

A panel of this Court noted in Blau v. Lamb, 363 F.2d 507, 519 (2d Cir. 1966), cert. den. 385 U.S. 1002 (1967), "This underlying purpose [of Section 16(b)] provides no reason for the application of Section 16(b) to a transaction that poses no danger whatever of insider abuse." Indeed, in Blau v. Lamb, supra, this Court further

noted, "The view that Section 16(b)'s purpose can be fully accomplished without subjecting to 16(b) sanctions every transaction describable in its terms has also commended itself to other United States Courts of Appeals." This approach to Section 16(b) as taken by Blau v. Lamb, was cited with approval in Kern County Land Co. v. Occidental, 411 U.S. 582, 595 (1973), where the Supreme Court held that an "unorthodox transaction" in securities did not present the possibility of speculative abuses of inside information and therefore was not a sale under Section 16(b). See also Foremost-McKesson v. Provident Securities Co., 423 U.S. 232, 237 (1976).

In Blau v. Lamb, supra, this Court further noted ". . . our court appears always to have recognized that in deciding whether a certain transaction is a Section 16(b) 'purchase' or 'sale' it is relevant to first consider whether the transaction in any way makes possible the unfair insider trading that Section 16(b) was designed to prevent." The Court further stated in Blau v. Lamb, "Congress adopted the sweeping, arbitrary regulatory mechanism embodied in Section 16(b) in order to insure that even the possibility of insider abuse was deterred, but it would seem to follow that in order to avoid 'purposeless harshness' a court should first inquire whether a given transaction could possibly tend to accomplish the practices Section 16(b) was designed to prevent."

The practices which Congress sought to eliminate by enacting Section 16(b) do not, we respectfully submit, embrace the alleged ERD transactions which cannot even remotely be read to "accomplish the practices Section 16(b) was designed to prevent."

Those practices consisted of trading with advance knowledge of inside information that would produce a rise or decline in the market price of a stock, or on the use of inside information to manipulate the market price by having a corporation pursue financial practices calculated to produce fluctuations in market price. See Blau v. Lamb, supra at 5. None of those practices are charged in the instant indictment. This Court's opinion does not even address the inquiry suggested in Blau v. Lamb, supra, nor does it even consider the ERD transactions in the light of the congressional purpose in enacting Section 16(b), as aforesaid.

With respect to this Court's reversal of the District Court's dismissal of Count 4, appellee respectfully refers the Court to the reasoning contained in appellees Fields' and Friedman's main brief at pages 62-69, which we respectfully submit this Court has overlooked.

III.

ADOPTION OF CO-APPELLEES' PETITIONS

Appellee Friedman respectfully adopts all arguments contained in the petitions for rehearing filed by his co-appellees, to the extent applicable to him.



IV.

ALTERNATIVE APPLICATION FOR STAY OF MANDATE

Appellee respectfully requests, in the event that the petition for rehearing and suggestion for rehearing in banc is denied, that this Court's mandate be stayed for 30 days pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure to allow application to the Supreme Court of the United States for a writ of certiorari to review this Court's decision. It is respectfully submitted, for the reasons advanced in the within petition, in appellee's original brief, and in oral argument on this appeal, that substantial issues appropriate for resolution by the Supreme Court exist in this case.

CONCLUSION

It is respectfully urged, for the reasons stated above, that this petition for rehearing and for rehearing in banc be granted, that the opinion of this Court be withdrawn, and that the Orders of the District Court should be affirmed.

Respectfully submitted,

Bender & Frankel

BENDER & FRANKEL
Attorneys for Appellee Friedman

LOUIS BENDER
SANDOR FRANKEL
Of Counsel

ORIGINAL

No. 77-1342
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN,
PETER S. DAVIS, ALAN E. SANDBERG, and
ERIC BERGE,

Defendants-Appellees.

B
P/S

PETITION FOR REHEARING
WITH A SUGGESTION
FOR A HEARING EN BANC

ON APPEAL FROM
THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Attorneys for ERIC BERGE,
Defendant-Appellee

No. 77-1342

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN,
PETER S. DAVIS, ALAN E. SANDBERG, and ERIC BERGE,

Defendants-Appellees.

PETITION FOR REHEARING WITH A SUGGESTION
FOR A REHEARING EN BANC

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Defendant-Appellee ERIC BERGE petitions this Court pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, for a rehearing with a suggestion for a rehearing en banc of a decision of a panel of this Court (Feinberg, Mansfield and Timbers, J.J.) dated September 14, 1978. Judge Mansfield wrote a separate

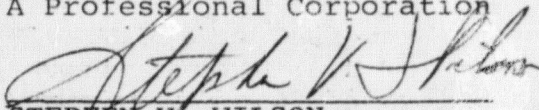
concurring opinion. The panel's decision reversed an order of the District Court (Haight, J.) (which had dismissed substantial portions of the indictment) and remanded the case with a direction to reinstate the unexpurgated indictment.

Defendant-Appellee Berge respectfully joins in and adopts the arguments set forth in the petition of co-appellees Fields and Sandberg.

DATED: October 16, 1978

Respectfully submitted,

HOCHMAN, SALKIN AND DeROY
A Professional Corporation



STEPHEN V. WILSON

Counsel for Defendant-Appellee,
ERIC BERGE

(CERTIFICATE OF SERVICE BY MAIL - RULE 25, F.R.A.P.)

Evangeline A. Gutierrez, certifies that (s)he is a citizen of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within action; that ~~(his)~~ (her) business address is: 732 East Washington Boulevard, Los Angeles, California 90021; that on the 16th day of October, 19 78, (s)he served the within

Petition for Rehearing with a Suggestion for A Rehearing En Banc.
on the following named parties
in said action, by placing a true copy thereof in an envelope addressed to the attorney(s) of record for said parties at the office address of said attorney(s) as follows:

See attached sheet.

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid in the United States mail at Los Angeles, California; that there is a delivery service by United States mail at the place so addressed, or there is a regular communication by United States mail between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Dated at
Los Angeles, California
October 16, 1978

Evangeline A. Gutierrez

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Assistant United States Attorney
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Exchange Commission
Washington, D. C.

(2 copies)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellant, :

-v-

AFFIDAVIT OF SERVICE BY MAIL

DOUGLAS P. FIELDS, FREDERICK M. :

FRIEDMAN, PETER S. DAVIS, ALAN E.

SANDBERG, and ERIC BERGE,

Defendants-Appellees. :

.....X

STATE OF NEW YORK)

SS:

COUNTY OF NEW YORK)

GUDRUN HANSEN, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides in Staten Island, New York.

On October 16, 1978, deponent served the accompanying Petition For Rehearing And Suggestion For Rehearing In Banc On Behalf Of Appellees Friedman And Berge and Notice of Motion and Affidavit for permission to file said Petition of 26 pages produced by the offset copying process upon the following attorneys in this action, at the following addresses designated by said attorneys for that purpose, by depositing true copies of same enclosed in post-paid properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

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Sworn to before me this
16th day of October, 1978.

Mona Ryan

MONA RYAN
NOTARY PUBLIC, State of New York
No. 24-8728360
Qualified in Kings County
Commission Expires March 30, 1980

Gudrun Hansen
GUDRUN HANSEN

Erased
RAG CONTENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-v-

DOUGLAS P. FIELDS, FREDERICK
M. FRIEDMAN, PETER S. DAVIS,
ALAN E. SANDBERG, and ERIC
BERGE,

Defendants-Appellees.

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